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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 PHILLIP C. RICHARDSON,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting  
14 Commissioner of the Social Security  
Administration,

15 Defendant.  
16

CASE NO. 14-cv-05068 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and  
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.  
19 Magistrate Judge and Consent Form, Dkt. No. 5; Consent to Proceed Before a United  
20 States Magistrate Judge, Dkt. No. 6). This matter has been fully briefed (*see* Dkt. Nos.  
21 12, 15, 16).

22 After considering and reviewing the record, the Court finds that the ALJ erred in  
23 her assessment of the medical opinion of examining psychologist Michael Brown, PhD,  
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1 by rejecting Dr. Brown's opinion without comment or explanation. Dr. Brown opined  
2 that plaintiff's anxiety would significantly interfere with plaintiff's ability to  
3 communicate and perform effectively in a work setting with even limited public contact.  
4 This opinion is significant because, if adopted, it would tend to support a finding of  
5 disability under the Act.

#### 6 BACKGROUND

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8 Plaintiff, PHILLIP C. RICHARDSON, was born in 1976, and was 34 years old on  
9 the alleged date of disability onset of June 21, 2010 (*see* Tr. 198-201, 202-07). Plaintiff  
10 graduated from high school and has no other education or training (Tr. 36). He has work  
11 experience doing manual labor in a shipyard, processing frozen crab, working as a  
12 dishwasher/prep cook in a restaurant, and distributing food for disaster relief (Tr. 229-  
13 234).

14 According to the ALJ, plaintiff has at least the severe impairments of "major  
15 depressive disorder, panic disorder, post-traumatic stress disorder, and substance abuse in  
16 partial remission (20 CFR 404.1520(c) and 416.920(c))" (Tr. 14).

17 At the time of the hearing, plaintiff was living alone in an apartment (Tr. 36

#### 18 PROCEDURAL HISTORY

19 Plaintiff's applications for disability insurance ("DIB") benefits pursuant to 42  
20 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to 42  
21 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and  
22 following reconsideration (*see* Tr. 62, 64-74, 88-100, 101-113). Plaintiff's requested  
23 hearing was held before Administrative Law Judge Rebekah Ross ("the ALJ") on  
24

1 October 19, 2012 (*see* Tr. 30-61). On November 2, 2012, the ALJ issued a written  
2 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social  
3 Security Act (*see* Tr. 9-29).

4 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or  
5 not the ALJ erred at step-two by failing to discuss symptoms and limitations arising from  
6 agoraphobia; (2) Whether or not evidence admitted by the Appeals Council ("AC") left  
7 the ALJ's step-three finding without substantial evidence support; (3) Whether or not the  
8 ALJ properly found plaintiff not credible; and (4) Whether or not the ALJ's Residual  
9 Functional Capacity ("RFC") properly included limitations arising from agoraphobia and  
10 insomnia (*see* Dkt. No. 12, p. 1).

#### 12 STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
14 denial of social security benefits if the ALJ's findings are based on legal error or not  
15 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
16 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
17 1999)).

#### 18 DISCUSSION

- 19 (1) Whether or not the ALJ erred at step-two by failing to discuss symptoms  
20 and limitations arising from agoraphobia.

21 In conjunction with plaintiff's argument that the ALJ erred by failing to discuss  
22 the symptoms and limitations arising from plaintiff's agoraphobia, plaintiff argues that  
23 the ALJ also erred in her assessment of the medical opinion of examining psychologist  
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1 Michael Brown, PhD. Dkt. No. 12, pp. 7-8. Specifically, plaintiff alleges that the ALJ  
2 erred by failing to consider or reject Dr. Brown's August 2011 opinion that plaintiff had a  
3 marked limitation in the ability to communicate and perform effectively in a work setting  
4 with limited public contact because plaintiff "is anxious in public settings." *See* Tr. 20,  
5 375. Dr. Brown defined "marked" as a "very significant interference" with the ability to  
6 perform basic work activities (Tr. 374).

7  
8 Plaintiff argues that Dr. Brown's opinion is significant because plaintiff's anxiety  
9 in public settings would negatively impact his ability to "consistently show up" for work.  
10 Dkt. No. 12, p 7. The Commissioner's regulations contemplate an RFC finding that is  
11 based on an individual's ability to perform sustained work activities on a regular and  
12 continuing basis, which means "8 hours a day, for 5 days a week, or an equivalent work  
13 schedule." *See* Social Security Ruling ("SSR") 96-8p, 1996 WL 374184\*2. For this  
14 reason, the inability to perform work activities on a regular and continuing basis could  
15 support a finding of disability under the Act. *See id.* Dr. Brown's opinion also is  
16 significant because the basic mental demands of unskilled competitive work require the  
17 ability, on a sustained basis, to "respond appropriately to supervision, coworkers, and  
18 usual work situations." SSR 85-15, 1985 WL 56857\*4. A substantial loss of the ability  
19 to perform any of these basic work-related activities also would justify a finding of  
20 disability under the Act. *Id.*

21  
22 As noted previously, the ALJ offered no reason to reject Dr. Brown's August 2011  
23 opinion (*see* Tr. 20). The Commissioner "may not reject 'significant probative evidence'  
24 without explanation." *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (*quoting*

1 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (*quoting Cotter v. Harris*, 642  
2 F.2d 700, 706-07 (3d Cir. 1981))). The “ALJ’s written decision must state reasons for  
3 disregarding [such] evidence.” *Flores*, 49 F.3d at 571.

4         Here, Dr. Brown examined plaintiff on three occasions during the relevant period  
5 in plaintiff’s claim (*see* Tr. 361-76). Consistent with Dr. Brown’s August 2011 opinion  
6 that plaintiff’s anxiety would significantly interfere with plaintiff’s ability to  
7 communicate and perform effectively in a work setting with even limited public contact,  
8 Dr. Brown observed that prior to the examination plaintiff “was very uncomfortable  
9 waiting in the lobby . . . although it was not all that crowded.” Tr. 373. Dr. Brown also  
10 noted that plaintiff “will avoid leaving home for fear of having a [p]anic attack and  
11 having no one [to] help him.” Tr. 373.

13         Defendant argues, however, that Dr. Brown’s February 2012 opinion regarding  
14 plaintiff’s mental limitations provides necessary context for interpreting Dr. Brown’s  
15 August 2011 opinion. Dkt. No. 15, p. 5. Namely, defendant observes that Dr. Brown’s  
16 February 2012 evaluation concludes that plaintiff “does have some anxiety around public  
17 settings and probably would not work well in public. In the past, however, he has been  
18 able to get along with bosses and co-workers and should be able to continue to do that.”  
19 Tr. 390. It also is important to note, however, that Dr. Brown made a similar observation  
20 in conjunction with the August 2011 evaluation.

21         In the August 2011 evaluation, which contains the marked limitation at issue  
22 before this Court, Dr. Brown noted plaintiff would have moderate limitations in his  
23 ability to maintain appropriate behavior in a work setting because “[plaintiff] was able to  
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1 get along with others at work in the past. Currently he would appear dysphoric and be  
2 anxious around others.” Tr. 375. Although a comparison of Dr. Brown’s 2011 and 2012  
3 evaluation findings indicates that Dr. Brown likely considered plaintiff’s functional  
4 limitations more severe in 2011 than in 2012, this does not diminish the significance of  
5 Dr. Brown’s August 2011 opinion regarding plaintiff’s marked limitations in the ability  
6 to communicate and perform effectively in a work setting.

7  
8 Moreover, although Dr. Brown’s 2012 findings tend to support that plaintiff’s  
9 anxiety symptoms may not have continued at a disabling level for the 12 month  
10 durational requirement (*see* 20 C.F.R. §§ 404.1509, 416.909), according to the Ninth  
11 Circuit, “[l]ong-standing principles of administrative law require us to review the ALJ’s  
12 decision based on the reasoning and actual findings offered by the ALJ - - not *post hoc*  
13 rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray*  
14 *v. Comm’r of the Soc. Sec. Admin.*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (*citing SEC v.*  
15 *Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)); *see also Molina v.*  
16 *Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we may not uphold an agency’s decision  
17 on a ground not actually relied on by the agency”) (*citing Chenery Corp.*, 332 U.S. at  
18 196). For these reasons, the ALJ erred by failing to specifically adopt or reject Dr.  
19 Brown’s August 2011 opinion regarding plaintiff’s social limitations. *See Flores*, 49  
20 F.3d at 570-71. For this reason, the Court finds that the defendant’s decision should be  
21 reversed and remanded for further administrative proceedings. On remand, the  
22 Commissioner should reassess the medical evidence of Dr. Brown, and, if necessary,  
23 obtain additional vocational expert testimony.  
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(2) Whether or not evidence admitted by the Appeals Council (“AC”) leaves the ALJ’s step-three findings without substantial evidence.

Plaintiff also argues that the new evidence, consisting of a mental functional assessment completed by plaintiff’s treating mental health counselor Jodi Taylor, MA, submitted for the first time to the Appeals Council, and considered by the Appeals Council in denying review of the ALJ’s decision, leaves the ALJ’s step-three findings without substantial evidence support. Dkt. No. 12, pp. 8-10. The Court already has concluded that the ALJ erred in reviewing the medical evidence and that this matter should be reversed and remanded for further consideration. For this reason, it is not necessary for the Court to reach a determination regarding the new evidence submitted to the Appeals Council. Nonetheless, on remand, the ALJ also should assess the new medical evidence of Ms. Taylor. In addition, to facilitate this assessment, the ALJ may wish to obtain Ms. Taylor’s treatment records.<sup>1</sup>

### CONCLUSION

Based on these reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

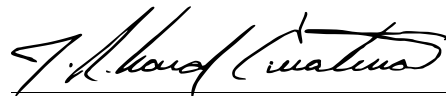
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<sup>1</sup> The functional assessment completed by Ms. Taylor indicates that she is a Mental Health Counselor Associate (“MHCA”) (Tr. 474, 481). In Washington State, an “associate” is a pre-licensure candidate with a graduate degree in a mental health field. Wash. Rev. Code § 18.225.090 (2008). Associates work under the supervision of a licensed mental health professional and are required to keep progress notes. Wash. Admin. Code § 246-809-035 (2009).

1 **JUDGMENT** should be for **PLAINTIFF** and the case should be closed.

2 Dated this 11<sup>th</sup> day of August, 2014.

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5 J. Richard Creatura  
6 United States Magistrate Judge  
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